925 N.E.2d 356
(Cite as: 925 N.E.2d 356)

C

Supreme Court of Indiana.
Robert E. CARTER, Jr., Director, DNR, and Indiana Department of Natural Resources, Appellants (Defendants below),
v.
NUGENT SAND COMPANY, Alice G. Julius, Annetta Radmes, Mildred Rauth, Sandra M. Goins, Paula C. Goodwin, Anna J. Goodwin, Rea E. Gogan, Melissa F. Hafenbreidel, and Paula C. Goodwin, as Personal Representative of the Estate of Charles N. Goodwin, Appellees (Plaintiffs below).
No. 49S00-0812-CV-00649.

April 14, 2010.

Background: Landowners and lessees of property around lake used for barges brought action against Department of Natural Resources (DNR) for declaratory judgment that the man-made lake and channel connected to river were private property. The Superior Court, Marion County, Kenneth H. Johnson, J., entered permanent injunction against DNR on ground that forcing landowners and lessees to dedicate lake and channel was unconstitutional taking. DNR appealed.

Holding: The Supreme Court, Shepard, C.J., held that lessee's failure to exhaust administrative remedy of DNR interpretation of public dedication requirement precluded the action several years after permit was issued.

Reversed and remanded.

West Headnotes

[1] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In general. Most Cited Cases
A regulation effects a taking of private property only when it deprives an owner of all or substantially all economic or productive use of the property. U.S.C.A. Const.Amend. 5.

[2] Eminent Domain 148 ⚿2.10(7)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(7) k. Exactions and conditions. Most Cited Cases
Even where there has not been a total deprivation of use of property, a taking without just compensation may occur when the government requires that an owner dedicate an easement allowing public access as a condition to obtaining a development permit; such an exaction must be roughly proportional both in nature and extent to the impact of the development for which the permit is required. U.S.C.A. Const.Amend. 5.

[3] Declaratory Judgment 118A ⚿44

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory remedy. Most Cited Cases
Lessee's failure to exhaust administrative remedy that Department of Natural Resources (DNR) would interpret public dedication of channel between lake and river precluded action, several years after receiving permit to dig channel, for declaratory judgment that lake and channel were private property for lessee's commercial barge operations and were not open to recreational boating and use; special conditions of approval documents for permit required dedication of all waters to public, and statute was plain that additional waters

were dedicated to public use. West's A.I.C. 4-21.5-5-4, 14-29-4-5(2); 312 IAC 3-1-15.

[4] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of administrative remedies. Most Cited Cases
Claimant within an available administrative remedy must pursue that remedy before being allowed access to the judicial power. West's A.I.C. 4-21.5-5-4.

[5] Declaratory Judgment 118A 44

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory remedy. Most Cited Cases
Where an administrative remedy is readily available, filing a declaratory judgment action is not a suitable alternative. West's A.I.C. 4-21.5-5-4.

[6] Declaratory Judgment 118A 44

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory remedy. Most Cited Cases
Courts do not generally entertain requests for declaratory relief if the result is to bypass available administrative procedures.

*357 Gregory F. Zoeller, Attorney General of Indiana, Frances Barrow, Deputy Attorney General, Julie E. Lang, Deputy Attorney General, Indianapolis, IN, Attorneys for Appellants.

Peter G. Tamulonis, Peter A. Velde, Eric D. Johnson, Indianapolis, IN, Attorneys for Appellees.

SHEPARD, Chief Justice.

Landowners and lessees obtained state approval a decade ago to dig a channel from the Ohio River to a nearby lake so that they could use the lake for a sand and gravel operation. They now seek judicial relief from conditions imposed within their *358 1999 permits. We conclude that that the present action should be dismissed for failure to exhaust administrative remedies.

Facts and Procedural History

Alice G. Julius and others (collectively, "landowners") own 156.2 acres of land adjoining the Ohio River in Utica, Indiana. Nugent Sand Company is a Kentucky partnership engaged in, among other things, the business of salt, sand, and gravel stockpiling and transportation. In May 1999, Nugent Sand leased the 156.2 acres for use in its commercial barge operations. The acreage contained a 50-acre man-made body of water, standing about 200 feet inland from the Ohio River. (App. at 11, 48.)

Nugent sought and acquired a permit from the Department of the Army, Corps of Engineers, because the excavation would connect the lake to the Ohio River, a navigable waterway. It also obtained certificates of regulatory approval from the Indiana Department of Natural Resources because the construction would take place in a floodway and involved construction of an access channel. Among the conditions contained in DNR's granted certificates were provisions mandated by a section of the Indiana Code: "If a channel will: (A) connect to a navigable river or stream; and (B) create additional water areas that will be connected to the navigable river or stream; dedicate any water created to general public use." Ind.Code § 14-29-4-5(2) (2008); (App. at 95.)

Following these approvals, Nugent Sand spent substantial sums to facilitate its operations on the leased premises. It excavated a channel through the Ohio River's bank to the man-made lake to accommodate a commercial barge operation, which in-

cluded navigating towboats and barges up to 195 feet in length and 35 feet in width through the lake. It also built a dock in the lake for unloading barges.

Around 2005, boaters began entering the lake for recreational purposes through the excavated channel. Many of the boaters created traffic and barge obstructions for Nugent Sand's operations by tying boats together, swimming in the lake, and engaging in various forms of raucous behavior. Nugent Sand posted and attempted to enforce "No Trespassing" and "Danger Barge Operations" signs at the entrance of the channel. The efforts to remove these unauthorized persons were largely unsuccessful. Third-party harbor boats subsequently began to decline to work in the lake, and a number of Nugent's own employees became apprehensive because of the heightened risk of property damage and serious bodily injury.

Nugent Sand contacted DNR about the unauthorized boaters. Specifically, it complained that people and boats prevented it from "conducting business operations on its own schedule," that it had scheduled nighttime barge operations "at additional costs and expenses," and further warned that such unauthorized traffic posed a serious danger to Nugent and the public at-large. (App. at 15-17, 179.) DNR replied that the waters were considered public and that the DNR did not intend to take action. DNR employees provided similar statements to citizens who called to inquire about the status of the lake. Nugent Sand then complained that the information regarding the DNR's position spread, prompting a further increase in visiting boaters.

Nugent Sand requested a meeting with Robert Carter, DNR Director. Although such a meeting was held and further discussions occurred with the DNR's Deputy Director and General Counsel, the Department ultimately declined to alter its position about public access.

***359** Nugent Sand and the landowners filed a complaint against DNR for declaratory and injunctive relief, seeking a declaration that the lake and channel were private property and an injunction barring DNR from informing that the lake and channel were open to the public. DNR moved to dismiss, contending that Nugent failed to exhaust its administrative remedies. The trial court denied the motion.

Nugent Sand moved for summary judgment, arguing essentially that the lake and the channel were private property from which they could exclude the public and that any attempt to force them to dedicate the property for public use without compensation would be an unconstitutional taking. (App. at 245-276.) DNR's response contended that Nugent exchanged providing public access to the lake and channel as a condition for digging the channel, and the public gained access to the property by virtue of Indiana statute as well as various common law principles. (App. at 290-313.) On October 28, 2008, the trial court agreed with Nugent Sand and entered a permanent injunction.

As the trial court held unconstitutional one of the statutes under which DNR had acted during the permitting process, DNR filed an appeal directly with this Court. Ind. Appellate Rule 4(A)(1)(b).

The Takings Claim

[1] Whether there is a winning takings claim at the heart of Nugent Sand's situation is doubtful. To be sure, we have known since at least 1922 that a taking of private property within the meaning of the Fifth Amendment may occur even if the government has not actually taken possession of the land. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). As Justice Holmes wrote, "if regulation goes too far it will be recognized as a taking." *Id.* at 415, 43 S.Ct. 158. The general standard for assessing whether a regulatory taking of private property for public purpose within the meaning of the Fifth Amendment remains the one outlined by the Court in *Penn Central Transp. Co. v. New York,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). A regulation effects a taking of

private property only when it deprives an owner of all or substantially all economic or productive use of the property. *Id.* at 127, 98 S.Ct. 2646. It seems apparent that this standard is not met by the situation that gives rise to this litigation.

[2] Even where there has not been a total deprivation, however, a Fifth Amendment violation may occur when the government requires that an owner dedicate an easement allowing public access as a condition to obtaining a development permit. Such an exaction must be roughly proportional both in nature and extent to the impact of the development for which the permit is required. *Lingle v. Chevron,* 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). While this would be a more plausible claim in the present situation, it is difficult to see that extracting public access as a condition to authorizing a major water project connecting to one of the nation's great rivers is not proportional and reasonably connected to the enterprise contemplated.

Doubtful as the takings claim may be, we conclude that the constitutional question need not be adjudicated in light of DNR's contention that it was entitled to a dismissal.

Exhaustion of Administrative Remedies

[3] The Department urges that it was entitled to a dismissal because Nugent Sand failed to exhaust available administrative remedies.

The basis of this argument is that remedies have existed and that the permits themselves informed Nugent Sand of the ***360** processes by which it could appeal any condition contained in the two permits. The permits notified Nugent of the procedures available under 312 Ind. Admin. Code 3-1, which affords a person the opportunity to request for a "Quasi-declaratory judgment" under 312 I.A.C. 3-1-15 by requesting the department "to interpret a statute or rule administered by the department as applicable to a specific factual circumstance." (*See* App. at 92, 98, Notices of Right to Administrative Review.) If the person seeking the request is aggrieved by the response, that person may file a petition for administrative review under Ind.Code § 4-21.5-3. 312 I.A.C. 3-1-15(d). "This section does not excuse a person from a requirement to exhaust another administrative remedy provided by statute or rule." 312 I.A.C. 3-1-15(e).

DNR maintains that instead of filing the present court action, Nugent should have undertaken these remedies for an interpretation of the dedication to public use requirement of Ind.Code § 14-29-4-5(2) and the application of this statute to the property at issue.

[4] "It has long been Indiana law that a claimant within an available administrative remedy must pursue that remedy before being allowed access to the judicial power." *Advantage Home Health Care, Inc. v. Ind. State Dept. of Health,* 829 N.E.2d 499, 503 (Ind.2005) (citations omitted). Our General Assembly has codified this general jurisprudential rule of administrative law through Ind.Code § 4-21.5-5-4, which provides: "A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged[.]"

[5] This Court has articulated the reasoning behind the policy of requiring pursuit of administrative remedies before resort to the courts. In *Turner v. City of Evansville*, we said:

> Premature litigation may be avoided, an adequate record for judicial review may be compiled and agencies retain the opportunity and autonomy to correct their own errors. Even if the ground of complaint is the unconstitutionality of the statute, which may be beyond the agency's power to resolve, exhaustion may still be required because 'administrative action may resolve the case on other grounds without confronting broader legal issues.'

740 N.E.2d 860, 862 (Ind.2001) (quoting *State Bd.*

of Tax Comm'rs v. Montgomery, 730 N.E.2d 680, 684 (Ind.2000)). Where such an administrative remedy is readily available, filing a declaratory judgment action is not a suitable alternative. *Advantage Home Health Care, Inc.*, 829 N.E.2d at 503.

Nugent Sand maintains it had no notice that it might need to invoke administrative processes because the terms imposed by DNR-requiring Nugent Sand to dedicate the pre-existing lake to general public use-are not set forth in the approvals, and it was only after the period for appeal expired that it became clear that DNR was going to declare all additional waters created by the project to be declared to public use. (Appellees' Br. at 33.) Nugent Sand cites *Bartholomew County Beverage v. Barco Beverage*, 524 N.E.2d 353 (Ind.Ct.App.1988) for support.

In *Barco*, two alcohol distributors, Barco and BCB, became engaged in a competitive pricing competition and Barco suffered losses after drastically reducing its prices. *Id.* at 354. Barco filed an action, claiming among other things that BCB engaged in illegal pricing practices, and the trial court returned a jury verdict in favor of Barco. *Id.* at 354-55.

***361** On appeal, BCB argued that the court should have dismissed the action as barred under the doctrine of exhaustion. The Court of Appeals disagreed, and held that the trial court did not err by allowing Barco to proceed. *Id.* at 356. The court reasoned that the exhaustion doctrine was inapplicable because no administrative procedure exists for persons harmed by a violation of the criminal portions of the Alcoholic Beverages Act, Ind.Code §§ 7.1-5-1-1 to 7.1-5-11-16, observing that the Alcoholic Beverages Commission did not have the power to award damages to a party aggrieved under the Act. *Id.* at 355-56.

By contrast, Nugent Sand had an administrative remedy. Indeed, each permit contained information about how to appeal. (*See* App. at 91-102.) Moreover, the terms imposed by DNR, "requiring all additional waters created by this project be dedicated to the public as required under IC-14-29-4," were explicitly set forth in the "Special Conditions" section of the approval documents. (*See* App. at 94-95, 100-101.) As for whether this language was adequate to alert Nugent to the fact that it was giving up exclusive use by virtue of obtaining the permits, there might have been some basis for debating whether the statute and the permit conditions applied to the channel and the lake or just to the channel. But Nugent has forcefully insisted that it gave up nothing at all ("even a single boater getting 'in the way' ... is an unacceptable interference," Appellees' Br. at 26) when the statute is plain that at least the channel ("all additional waters") were being dedicated to public use. DNR gave plain enough notice.

Other Arguments Against Dismissal

[6] Nugent Sand also contends that the trial court had discretion to dismiss the present case or retain it, citing *Scales v. State*, 563 N.E.2d 664 (Ind.Ct.App.1990). There, the trial court dismissed a declaratory judgment filed in the midst of an administrative appeal from an order to cease coal mining operations. The Court of Appeals affirmed the dismissal, saying that the trial court had not "abused its discretion." *Id.* at 665. While Nugent is correct to cite this phrase as part of the standard of review, the larger picture is that courts do not generally entertain requests for declaratory relief "if the result is to bypass available administrative procedures." *Id.* at 666-67. Dismissal was the right result in *Scales*, and that is the appropriate outcome here, where the available process was ignored a decade ago. FN1

FN1. The *Scales* court relied on *Thompson v. Medical Licensing Bd.*, 180 Ind.App. 333, 346, 389 N.E.2d 43, 51 (1979). *Scales*, 563 N.E.2d at 666. There, the Court of Appeals said: "Allowing the Declaratory Judgment Act to be used as a vehicle to bypass the administrative process created by statute can seriously weak-

en the effectiveness of that process."

Likewise, Nugent has argued that its case should not be subject to dismissal because at least one of the issues (here, statutory construction or constitutional violations) falls within the "primary jurisdiction" of the courts rather than with the government agency, citing *Austin Lakes Joint Venture v. Avon Utilities, Inc.*, 648 N.E.2d 641 (Ind.1995). Austin Lakes, however, was a lawsuit for breach of contract and fraud between two private parties. This Court noted that "we believe the doctrine [of primary jurisdiction] will generally be found *not* applicable when one of the parties before the court is the agency to which the issue would be referred." *Id.* at 648. Here, the defendant is DNR, the agency that imposed the permit condition of dedication of waters to public use.

***362 Conclusion**

We reverse the trial court and remand with directions to grant the Department's motion to dismiss.

SULLIVAN, BOEHM, and RUCKER, JJ., concur.
DICKSON, J., concurring in result.
Ind.,2010.
Carter v. Nugent Sand Co.
925 N.E.2d 356

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928 N.E.2d 273
(Cite as: 928 N.E.2d 273)

C

Court of Appeals of Indiana.
John DYER, David White and Maurice Dillender, Appellants-Plaintiffs,
v.
James H. HALL and Nu-Plaza Yacht Club, Appellees-Defendants.
No. 82A01-0910-CV-510.

June 16, 2010.

Background: Landowners on river brought action against yacht club owner seeking an injunction and damages on claims that the owner's boat docks extended in front of their lots and interfered with their use of the river. The Circuit Court, Vanderburgh County, Carl A. Heldt, J., entered summary judgment in favor of the yacht club owner. Landowners appealed.

Holdings: The Court of Appeals, May, J., held that:
(1) a triable issue existed as to whether placement of boat docks on river was a nuisance that interfered with landowners' riparian rights, and
(2) a triable issue existed as to whether yacht owner's continued to use and maintenance of "deadmen" pipes was a trespass.

Reversed.

West Headnotes

[1] Judgment 228 ⚿178

228 Judgment
228V On Motion or Summary Proceeding
228k178 k. Nature of summary judgment. Most Cited Cases
The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and that can be resolved as a matter of law.

[2] Appeal and Error 30 ⚿863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In general. Most Cited Cases

Appeal and Error 30 ⚿901

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k901 k. Burden of showing error. Most Cited Cases

Appeal and Error 30 ⚿934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In general. Most Cited Cases
A summary judgment is clothed with a presumption of validity on appeal, and the appellant bears the burden to show the trial court erred; nevertheless, the record must be carefully scrutinized to ensure the nonmoving party was not improperly denied a day in court.

[3] Water Law 405 ⚿1229

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1228 Nature and Extent of Rights in General
405k1229 k. In general. Most Cited Cases
The term "riparian rights" indicates a bundle of rights that turn on the physical relationship of a body of water to the land abutting it; riparian rights are special rights pertaining to the use of water in a

waterway adjoining the owner's property.

[4] Water Law 405 ⚿1222

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1222 k. Application or abrogation of common law doctrine in general. Most Cited Cases

Water Law 405 ⚿1229

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1228 Nature and Extent of Rights in General
405k1229 k. In general. Most Cited Cases
Riparian rights of the owners of lands fronting navigable waters are derived from common law as modified by statute.

[5] Water Law 405 ⚿1231

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1228 Nature and Extent of Rights in General
405k1231 k. Title and rights in general. Most Cited Cases

Water Law 405 ⚿1238

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1228 Nature and Extent of Rights in General
405k1238 k. Reasonable use. Most Cited Cases
A riparian landowner does not own the water in a stream that runs along his property, but he does own the right to the reasonable use of the stream as part of the title to his real estate.

[6] Water Law 405 ⚿1235

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1228 Nature and Extent of Rights in General
405k1235 k. Access to water in general. Most Cited Cases

Water Law 405 ⚿1238

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1228 Nature and Extent of Rights in General
405k1238 k. Reasonable use. Most Cited Cases

Water Law 405 ⚿1250(2)

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1246 Right to Wharf Out, Build Docks, and Support Shore
405k1250 Structures
405k1250(2) k. Wharves, docks, piers and similar structures. Most Cited Cases
While property ownership rights might end at a low water mark, "riparian rights" could not; those rights must extend beyond the low water mark in order for the property owner to exercise his right of access to navigable water, right to build a pier out to the line of navigability, and right to reasonable use of the water.

[7] Water Law 405 ⚿1235

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1228 Nature and Extent of Rights in General
405k1235 k. Access to water in general. Most Cited Cases

Water Law 405 ⚿1241

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1228 Nature and Extent of Rights in General
405k1241 k. Use for recreational purposes in general. Most Cited Cases

Water Law 405 ⚿1250(2)

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1246 Right to Wharf Out, Build Docks, and Support Shore
405k1250 Structures
405k1250(2) k. Wharves, docks, piers and similar structures. Most Cited Cases

Water Law 405 ⚿1493

405 Water Law
405VI Riparian and Littoral Rights
405VI(E) Accretion, Reliction, and Avulsion
405k1492 Title to Land Formed by Accretion or Lost Through Reliction; Effect on Adjacent Owners' Boundaries
405k1493 k. In general. Most Cited Cases
The rights associated with "riparian" ownership generally include: (1) the right of access to navigable water; (2) the right to build a pier out to the line of navigability; (3) the right to accretions; and (4) the right to a reasonable use of the water for general purposes such as boating and domestic use.

[8] Water Law 405 ⚿1198

405 Water Law
405V Diffuse Surface Waters
405V(B) Actions or Other Proceedings to Determine, Establish, and Protect Rights
405k1198 k. Nuisance. Most Cited Cases

Water Law 405 ⚿1450.1

405 Water Law
405VI Riparian and Littoral Rights
405VI(C) Injuries to Riparian Rights in General
405VI(C)9 Nuisance
405k1450.1 k. In general. Most Cited Cases
In terms of riparian rights, if a body of water is mere surface water, nuisance law is inapplicable; but if it is a natural watercourse, nuisance law may apply. West's A.I.C. 32-30-6-6.

[9] Nuisance 279 ⚿1

279 Nuisance
279I Private Nuisances
279I(A) Nature of Injury, and Liability Therefor
279k1 k. Nature and elements of private nuisance in general. Most Cited Cases
A private nuisance arises when it is demonstrated that one party uses his property to the detriment of the use and enjoyment of the property of another.

[10] Nuisance 279 ⚿1

279 Nuisance
279I Private Nuisances
279I(A) Nature of Injury, and Liability Therefor
279k1 k. Nature and elements of private nuisance in general. Most Cited Cases

Nuisance 279 ⚿5

279 Nuisance
279I Private Nuisances
279I(A) Nature of Injury, and Liability Therefor
279k5 k. Exercise of legal right. Most Cited Cases
A nuisance might be a nuisance per se, that is, a nuisance at law, or a nuisance per accidens, that is, a nuisance in fact; nuisance per se is that which is a nuisance in itself, and which, therefore, cannot be so conducted or maintained as to be lawfully car-

ried on or permitted to exist, whereas an otherwise lawful use may become a nuisance per accidens by virtue of the circumstances surrounding the use.

[11] Nuisance 279 ⚿34

279 Nuisance
279I Private Nuisances
279I(C) Abatement and Injunction
279k34 k. Trial or hearing. Most Cited Cases

Nuisance 279 ⚿53

279 Nuisance
279I Private Nuisances
279I(D) Actions for Damages
279k51 Trial
279k53 k. Questions for jury. Most Cited Cases
The determination that something is a nuisance per se is a question of law, and the determination of a nuisance per accidens, a question for the trier of fact; the latter determination is to be made in light of all the surrounding facts and circumstances, and the dispositive question is whether the thing complained of produces such a condition as in the judgment of reasonable persons is naturally productive of actual physical discomfort to persons of ordinary sensibility, tastes, and habits.

[12] Judgment 228 ⚿181(33)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort cases in general. Most Cited Cases
In per accidens nuisance cases, summary judgment, which by definition resolves only those cases lacking material factual disputes, is rarely appropriate.

[13] Judgment 228 ⚿181(33)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort cases in general. Most Cited Cases
A genuine issue of material fact existed as to whether the placement of yacht club owner's river boat docks interfered with landowners' riparian rights in navigating boats to shoreline, precluding summary judgment for yacht club owner on landowners' nuisance claim.

[14] Judgment 228 ⚿185.2(8)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.2 Use of Affidavits
228k185.2(8) k. Operation and effect of affidavit. Most Cited Cases
On a motion for summary judgment, a genuine issue of material fact generally cannot be created through a witness's own inconsistent testimony.

[15] Judgment 228 ⚿181(33)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort cases in general. Most Cited Cases
A genuine issue of material fact existed as to whether yacht club owner continued to use and maintain "deadmen" pipes for river boat docks after landowners on the river told owner to stop using the deadmen, precluding summary judgment for yacht club owner on landowners' trespass claim.

[16] Trespass 386 ⚿12

386 Trespass
386I Acts Constituting Trespass and Liability Therefor
386k9 Trespass to Real Property
386k12 k. Entry. Most Cited Cases

Trespass 386 ⚿20(1)

386 Trespass
386II Actions
386II(A) Right of Action and Defenses
386k20 Possession or Right of Possession of Plaintiff
386k20(1) k. Necessity and effect in general. Most Cited Cases
To show trespass, it is necessary for the plaintiff to prove only that he was in possession of the land and that the defendant entered thereon without right.

[17] Trespass 386 ⇐50

386 Trespass
386II Actions
386II(D) Damages
386k50 k. Entry on and injuries to real property. Most Cited Cases
Proof of trespass to property entitles the plaintiff to nominal damages without proof of injury, and upon additional proof of injury to products of the soil, the plaintiff is entitled to compensatory damages.
*275 Catherine A. Nestrick, Bamberger, Foreman, Oswald and Hahn, LLP, Evansville, IN, Attorney for Appellants.

Jeffrey W. Henning, Rudolph, Fine, Porter & Johnson, LLP, Evansville, IN, Attorney for Appellees.

OPINION

MAY, Judge.

The plaintiffs John Dyer, David White, and Maurice Dillender (collectively "the Landowners") own land on the Ohio River. They asked for an injunction and damages, claiming boat docks owned by James Hall and the Nu-Plaza Yacht Club (collectively "Hall") extend in front of their lots and interfere with their use of the river. The trial court granted summary judgment for Hall, finding the Landowners' riparian rights do not extend beyond the river's low water mark and the docks did not interfere with their use of the river. The Landowners raise eight allegations of error, which we consolidate and restate as:

1. The trial court erred in finding the Landowners' riparian rights extend only to the low water mark;

2. The trial court erred in finding the docks are not a private nuisance because they do not interfere with the Landowners' use of or access to the river;

3. The trial court erred in finding the construction and maintenance of deadmen [FN1] located on two Landowners' lots do not amount to a trespass.

> FN1. A "deadman" is a pipe driven into the ground to which cables are attached to hold the docks in place. (Br. of Appellants at 4.)

We reverse.[FN2]

> FN2. We heard oral argument April 30, 2010 at the Posey County Courthouse in Mount Vernon as part of the Law Day observance. We thank the Posey County Courts for their hospitality and commend counsel on the quality of their oral advocacy.

FACTS AND PROCEDURAL HISTORY

The Landowners' lots are along the Ohio River in an area of Vanderburgh County called Dogtown. The lots were part of a twenty-two acre parcel that was subdivided in 1996. The Landowners subsequently bought their lots. The Yacht Club is a marina that has been in its current location in front of the Landowners' lots since at least 1970. Hall purchased the Yacht Club in 2000. The marina consists of one dock that extends into the river and two docks that run both upstream and downstream.

In 1980, the owner of the Yacht Club placed deadmen [FN3] along the shoreline to help anchor the docks. Two are on Dillender's *276 property and one is on Dyer's. Neither landowner gave "Hall or anyone else permission to have this deadman located

upon his property." (Appellants' App. at 57) (Dyer affidavit); (*id.* at 63) (Dillender affidavit).

> FN3. In his Statement of Facts, Hall asserts the Army Corps of Engineers, which regulates use of the river, "requested that the deadmen be placed along the shore line to help anchor the Yacht Club." (Br. of Appellees at 3.) Hall cites pages of the record that refer to "permits from the Corps of Engineers," (Appellees' App. at 61), but do not support the statement the Corps "requested" the placement of the deadmen.
>
> Hall also asserts landowner Dillender and a prior owner of the Yacht Club "together installed" a deadman on Dillender's property, and "Dillender is now citing to this deadman for a trespass claim." (Br. of Appellees at 3.) This, too, mischaracterizes the parts of the record on which Hall relies. Nothing on the pages he cites indicates the *installation* of the deadman is the basis for Dillender's trespass claim. Dillender referred to the deadman as his own, and when asked why there was a trespass, he responded "[Hall has] his cables on it. He's been asked to remove them." (Appellees' App. at 94.) Nor do the pages to which Hall directs us support Hall's statement that Dillender was involved in installing the deadman. However, elsewhere in the record Dillender states the deadman was installed by "Me and Walter McFarland," a prior owner of the Yacht Club. (*Id.* at 95.)

Landowner White asserts the Yacht Club docks prevent him from having a usable dock or navigating a boat to and from the shoreline. Dillender stated in a deposition that the docks "hinder" him from going into the river:

> If I've got a pontoon boat I have to back all of the way out past where he has extended the slip back all of the way out to get to the river. You can't turn around in there because he has come in on me and he has shortened the distance between my place and his boats that he parks out there and I've had them, the boats, actually hit my boat trying to get around.

(*Id.* at 66.)

The Landowners filed a complaint requesting injunctive relief and damages. Hall moved for summary judgment. The trial court granted summary judgment for Hall, finding the Landowners' riparian rights do not extend beyond the river's low water mark and the docks did not interfere with their use of the river.

DISCUSSION AND DECISION

On appeal from a summary judgment, we apply the same standard applicable in the trial court. *Bader v. Johnson,* 732 N.E.2d 1212, 1216 (Ind.2000). We determine whether the record reveals a genuine issue of material fact and whether the trial court correctly applied the law. *Id.* Any doubt as to a fact or an inference to be drawn is resolved in favor of the non-moving party, here the Landowners. *Id.* Where the issue presented on appeal is a pure question of law, we review the matter *de novo*. *Id.* "Appellate courts independently, and without the slightest deference to trial court determinations, evaluate those issues they deem to be questions of law. A pure question of law is one that requires neither reference to extrinsic evidence, the drawing of inferences therefrom, nor the consideration of credibility questions for its resolution." *Id.* (quoting 4A Kenneth M. Stroud, Indiana Practice § 12.3 (2d ed. 1990)).

[1][2] The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and that can be resolved as a matter of law. *Dunaway v. Allstate Ins. Co.,* 813 N.E.2d 376, 380 (Ind.Ct.App.2004). A summary

judgment is clothed with a presumption of validity on appeal, and the appellant bears the burden to show the trial court erred. *Id.* Nevertheless, the record must be carefully scrutinized to ensure the nonmoving party was not improperly denied a day in court. *Id.* We accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmoving party, and resolve all doubts against the moving party. *Id.* If the summary judgment can be sustained ***277** on any theory or basis in the record, we will affirm. *Id.*

1. *The Nature and Extent of the Landowners' Riparian Rights*

[3][4][5][6][7] An owner whose property abuts a river has certain riparian rights associated with ownership of the property:

> The term "riparian rights" indicates a bundle of rights that turn on the physical relationship of a body of water to the land abutting it. Riparian rights are special rights pertaining to the use of water in a waterway adjoining the owner's property. Riparian rights of the owners of lands fronting navigable waters are derived from common law as modified by statute. According to some authorities, riparian rights do not necessarily constitute an independent estate and are not property rights *per se;* they are merely licenses or privileges. Stated differently, they constitute property rights of a qualified or restricted nature.

Center Townhouse Corp. v. City of Mishawaka, 882 N.E.2d 762, 767-68 (Ind.Ct.App.2008) (citations omitted), *trans. denied.* A riparian landowner does not own the water in a stream that runs along his property, but he does own the right to the reasonable use of the stream as part of the title to his real estate.[FN4] *Id.* at 768. In Indiana, the rights associated with riparian ownership generally include: (1) the right of access to navigable water; (2) the right to build a pier out to the line of navigability;[FN5] (3) the right to accretions;[FN6] and (4) the right to a reasonable use of the water for general purposes such as boating and domestic use. *Id.* at 771.

FN4. The trial court's decision appears to confuse riparian rights and property *ownership* rights. It concluded "a riparian owner takes to the low water mark, not to the center as claimed by Plaintiffs." (Appellants' App. at 20.) However, in support of that conclusion the court cited a decision where we determined the extent of an owner's title to property: *Irvin v. Crammond,* 58 Ind.App. 540, 108 N.E. 539, 541 (1915) ("where land is bounded by the Ohio river on the Indiana side, *the title* of the owner extends to low-water mark") (emphasis supplied).

> The trial court went on to determine the Landowners' "riparian rights do not include the extension of their *onshore boundaries* to the middle of the Ohio River. Instead, their riparian ownership stops at the low water mark. Therefore, Plaintiffs' claim that their *property boundaries* extend from the shoreline to the middle of the Ohio River is denied." (Appellants' App. at 21) (emphasis supplied).
>
> It does not appear the Landowners made any claim that they "take title" to the center of the river. And, while property *ownership* rights might end at the low water mark, *riparian* rights could not. Those rights must extend beyond the low water mark in order for the property owner to exercise his right of access to navigable water, right to build a pier out to the line of navigability, and right to reasonable use of the water. *See, e.g., Center Townhouse,* 882 N.E.2d at 771.

FN5. Neither the trial court nor the parties provide a definition for "line of navigability." We have mentioned that phrase in three decisions, but have not defined or ex-

plained it. No definition appears in the Indiana Code, the Indiana Administrative Code, the Code of Federal Regulations, or Black's Law Dictionary. The Washington Administrative Code defines "line of navigability" as "a measured line at that depth sufficient for ordinary navigation as determined by the board of natural resources for the body of water in question." Wash. Admin. Code § 332-30-106.

FN6. "Accretion" is the gradual accumulation of land by natural forces, such as the deposits of soil, sand or clay caused by running water to land situated on the bank of a river. *Black's Law Dictionary* 21 (Seventh ed. 1999).

Ind.Code § 14-29-1-4 provides:

(a) Subject to subsection (b), a riparian owner of land in Indiana bordering upon a navigable stream may do the following:

(1) Build and maintain:

***278** (A) within the premises bordering on the stream; and

(B) upon the submerged land beneath the water; a pier, wharf, dock, or harbor in aid of navigation and commerce.

(2) Use, occupy, and enjoy the constructed item as appurtenant to the owner's land.

(b) A pier, dock, or wharf may not do any of the following:

(1) Extend into the stream further than is necessary to accommodate shipping and navigation.

(2) Obstruct shipping and navigation.

"Whether this statute is a complete definition of riparian rights or is meant only as a limitation on what types of obstructions a riparian owner may place in a stream or river is not clear." *Center Townhouse,* 882 N.E.2d at 771. The statute has been applied to require a landowner to remove his pier when its placement infringed on his neighbor's pier. *Id.*

The Landowners argue "the marina's docks greatly exceed the upper and lower boundaries of its riparian zone, and encroach upon" theirs. (Br. of Appellants at 11.) They cite *Bainbridge v. Sherlock,* 29 Ind. 364 (1868). In that case, Bainbridge owned land on the Ohio River in Madison and operated a wharf. He sued Sherlock, who operated a neighboring wharf, because boats that landed at Sherlock's wharf were blocking access by boats that wanted to land at Bainbridge's wharf. Our Indiana Supreme Court noted:

> They (riparian owners) have the right to construct wharves, buildings, and other improvements in front of their lands, so long as the public servitude is not thereby impaired. They are a part of the realty to which they are attached, and pass with it. Certainly no one can occupy, for his individual purposes, the water in front of such riparian proprietor, and the attempt of any person to do so would be a trespass.

Id. at 373 (quoting *Rice v. Ruddiman,* 10 Mich. 125 (1862)). Therefore, boats navigating the Ohio River "had no right to land on the wharf of the plaintiff unless by his consent. The defendants were trespassers for each act of injury to the plaintiff caused by landing their boats." *Id.*

It is not apparent that *Bainbridge* stands for the propositions that a riparian owner's structure can be placed only "in front of" the owner's land, that a dock may not extend in front of another's land so long as it does not block the other landowner's access to the river, or that a riparian owner may not "encroach" on the other owner's "riparian zone." Ind.Code § 14-29-1-4 provides only that a dock may not "[e]xtend into the stream further than is necessary to accommodate shipping and navigation" or "[o]bstruct shipping and navigation."

As riparian rights pertain to "the *use* of water in a waterway adjoining the owner's property," and are not property rights *per se, Center Township,* 882 N.E.2d at 768, the determinative question is whether Hall's docks interfered with the Landowners' access to and use of the River, and not where the Landowners' *title* ended. Hall cites the list of riparian owners' rights from *Center Townhouse* noted above, and asserts the Landowners are able to exercise all those rights. As explained below, the Landowners' designated evidence gives rise to a genuine issue of fact as to whether there was such interference, and summary judgment for Hall was therefore improper.

2. *Nuisance*

[8][9] The trial court found Hall's docks were not a private nuisance because "the Plaintiffs have reasonable use and ***279** access to the river." (Appellants' App. at 21.) Whatever is "(1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." Ind.Code § 32-30-6-6. If a body of water is mere surface water, nuisance law is inapplicable. *Trowbridge v. Torabi,* 693 N.E.2d 622, 626 (Ind.Ct.App.1998), *trans. denied* 706 N.E.2d 172 (Ind.1998). But if it is a natural watercourse, nuisance law may apply. *Id.* A private nuisance arises when it is demonstrated that one party uses his property to the detriment of the use and enjoyment of the property of another. *Mills v. Kimbley,* 909 N.E.2d 1068, 1075 (Ind.Ct.App.2009), *reh'g denied.*

[10][11][12] A nuisance might be a nuisance *per se* (a nuisance at law), or a nuisance *per accidens* (a nuisance in fact). *Id.* A nuisance *per se* is that which is a nuisance in itself, and which, therefore, cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. *Id.* On the other hand, an otherwise lawful use may become a nuisance *per accidens* by virtue of the circumstances surrounding the use. *Id.* "It is logical, therefore, that the determination that something is a nuisance *per se* is a question of law, and the determination of a nuisance *per accidens,* a question for the [trier of fact]." *Id.* (internal quotation omitted). The latter determination is to be made in light of all the surrounding facts and circumstances, and the dispositive question is whether the thing complained of produces such a condition as in the judgment of reasonable persons is naturally productive of actual physical discomfort to persons of ordinary sensibility, tastes, and habits. *Id.* Summary judgment, which by definition resolves only those cases lacking material factual disputes, is rarely appropriate in *per accidens* nuisance cases. *Id.* Neither party acknowledges that distinction, but it seems apparent the nuisance alleged in the case before us is *per accidens.*

[13] The parties appear to acknowledge the nuisance question depends on whether the Landowners presented evidence their riparian rights are impaired by Hall's docks. There is an issue of fact as to whether or to what extent the Landowners have access, and summary judgment on that issue was error. Landowner White averred the Yacht Club docks prevent him from having a usable dock or navigating a boat to and from the shoreline. Dillender stated in a deposition that the docks "hinder," but do not prevent, his access to the river:

> If I've got a pontoon boat I have to back all of the way out past where he has extended the slip back all of the way out to get to the river. You can't turn around in there because he has come in on me and he has shortened the distance between my place and his boats that he parks out there and I've had them, the boats, actually hit my boat trying to get around.

(Appellants' App. at 66.)

Hall does not acknowledge those statements in his Statement of Facts or nuisance argument, but elsewhere in his brief he does note Dillender averred the docks "prevent the Affiant from being able to

navigate a boat to and from their [sic] shoreline," (*id.* at 63), but when deposed said the docks "hinder" but do not "prevent" his access. (*Id.* at 66.) He also notes Dyer's deposition testimony that, despite Hall's docks, he is able to get his own two boats in and out, as can his guests with large boats; the docks do not interfere with his swimming in the river; and ***280** he has reasonable ingress and egress to the river.

[14] We acknowledge a genuine issue of material fact generally cannot be created through a witness's own inconsistent testimony. *Miller v. Martig,* 754 N.E.2d 41, 46 (Ind.Ct.App.2001) (finding no issue of material fact where witness was inconsistent). But despite some inconsistencies, the landowners designated sufficient evidence of the docks' interference with their riparian rights that summary judgment was improper.

3. *Trespass*

[15][16][17] The Landowners' trespass allegation is premised on the placement and maintenance of the deadmen on the Dillender and Dyer properties. To show trespass,

> it is necessary for the plaintiff to prove only that he was in possession of the land and that the defendant entered thereon without right, such proof entitling the plaintiff to nominal damages without proof of injury, and upon additional proof of injury to products of the soil, the plaintiff is entitled to compensatory damages.

Hawke v. Maus, 141 Ind.App. 126, 131, 226 N.E.2d 713, 717 (1967).

The Landowners acknowledge the deadmen were installed with permission, but "it is the continued use and maintenance of these deadmen for which the trespass claim is brought." (Br. of Appellants at 16.) Hall asserts, citing only his own affidavit, "These deadman [sic] are not even being used by the Yacht Club.... The Yacht Club did not construct or maintain these deadmen." (Br. of Appellees at 14.) Hall notes testimony by some Landowners that the deadmen do not bother them or cause interference, and that the deadmen were there when the Landowners purchased their lots, but he does not explain the significance of that testimony to the trespass claim.

Dillender, in his deposition, indicated Hall is using the deadman on his property. He said he and a prior owner of the Yacht Club installed it, and he believed the deadman was a trespass because "[Hall]'s got his cables on it. He has been asked to remove them." (Appellees' App. at 95.)

The Landowners designated sufficient evidence of trespass, in the form of testimony Hall continued to use and maintain the deadmen after being asked to remove them, to survive summary judgment. In *Turner v. Sheriff of Marion County,* 94 F.Supp.2d 966, 984 (S.D.Ind.2000), the Southern District of Indiana noted:

> Under the doctrine of trespass *ab initio,* a person who lawfully enters property under color of law (*e.g.,* a government agent or private individual acting under legal authority) then later abuses that authority by a positive act of misconduct will be considered a trespasser *ab initio* and liable in trespass for his acts from the first moment of his entry.

To the extent the Landowners' trespass claim is premised on use and maintenance of the deadman after Hall was told to stop using it, and not its original installation,[FN7] there is an issue of fact that precludes summary judgment.[FN8]

> FN7. The landowners' complaint alleges trespass in the form of "retention, *use,* and maintenance" of the deadmen "after Plaintiffs requested they be removed." (Appellants' App. at 28.) The record does not reflect when Hall was asked to remove the cables from the deadmen.
>
> FN8. At oral argument, Hall represented he

did not have cables attached to the deadmen. Should that be true, this section of the opinion would be moot.

***281 CONCLUSION**

As the landowners designated evidence that gives rise to a genuine issue of fact as to whether the docks and deadmen are a nuisance or a trespass, Hall was not entitled to summary judgment. We accordingly reverse.

Reversed.

BRADFORD, J., and BROWN, J., concur.
Ind.App.,2010.
Dyer v. Hall
928 N.E.2d 273

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